3-26-2013

Teurlings v. Larson Respondent's Brief Dckt. 40502

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM P. TEURLINGS, Plaintiff-Appellant, v. MALLORY E. LARSON, nka MALLORY E. MARTINEZ, Defendant-Respondent.	SUPREME COURT NO: 40502-2012 (Clearwater Co. Case No: CV09-420)

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Clearwater County
Honorable Carl B. Kerrick, District Judge, Presiding

Ned A. Cannon
SMITH & CANNON PLLC
508 Eighth Street
Lewiston, Idaho 83501
Telephone: (208) 743-9428
Facsimile: (208) 746-8421

Attorney for Plaintiff-Appellant

Sonyalee R. Nutsch
CLEMENTS, BROWN & McNICHOLS, P.A
321 13th Street
Lewiston, Idaho 83501
Telephone: (208) 743-6538
Facsimile: (208) 746-0753

Attorneys for Defendant-Respondent

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM P. TEURLINGS, Plaintiff-Appellant, v. MALLORY E. LARSON, nka MALLORY E. MARTINEZ, Defendant-Respondent.	SUPREME COURT NO: 40502-2012 (Clearwater Co. Case No: CV09-420)

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Clearwater County
Honorable Carl B. Kerrick, District Judge, Presiding

Ned A. Cannon
SMITH & CANNON PLLC
508 Eighth Street
Lewiston, Idaho 83501
Telephone: (208) 743-9428
Facsimile: (208) 746-8421

Attorney for Plaintiff-Appellant

Sonyalee R. Nutsch
CLEMENTS, BROWN & McNICHOLS, P.A
321 13th Street
Lewiston, Idaho 83501
Telephone: (208) 743-6538
Facsimile: (208) 746-0753

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

I. TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

II. STATEMENT OF THE CASE

A. Nature of the Case

On January 7, 2007, Mallory Martinez fka Larson ("Ms. Martinez") was on duty with the Idaho Army National Guard when she was involved in an automobile accident with William Teurlings ("plaintiff"). (R, Vol. 1, p. 167, ¶¶5-7; p. 170; p. 173, ¶¶ 5-7). On January 6, 2009, plaintiff filed a Complaint alleging one state law claim of negligence against Ms. Martinez. (R, pp. 7-9). Plaintiff's Complaint did not contain any federal claims. *See id.*

B. Course of Proceedings

Because National Guard members are exempt from liability for state law claims arising out of their activities when they are in training or acting under duty, Ms. Martinez filed a Motion for Summary Judgment asking the Court to dismiss plaintiff's Complaint. (R, pp.157-177). On July 13, 2012, the District Court granted Ms. Martinez' Motion for Summary Judgment. (R, pp. 326-338). Final Judgment dismissing plaintiff's Complaint against Ms. Martinez was entered on July 19, 2012. (R, p. 340).

On July 27, 2012, plaintiff filed a Motion for Reconsideration and a Motion to Alter or Amend the Judgment. (R, pp. 342-343, 353-354). On October 4, 2012, the District Court denied plaintiff's Motion for Reconsideration and Motion to Alter or Amend the Judgment. (R, pp. 379-384). On November 15, 2012, plaintiff filed his Notice of Appeal. (R, pp. 385-389).

C. Facts

Ms. Martinez is a member of the Idaho Army National Guard, 145th HHC Support Battalion, headquartered in Lewiston, Idaho. She has been a member of the National Guard for over nine (9) years and has currently achieved the rank of E-5 – Sergeant. (R, p. 374). As a member of the National Guard, unless she has been called to active duty, Ms. Martinez is required to attend monthly instruction drills. Attendance at the drills is mandated by federal law. (R, p. 167, ¶4; p. 173, ¶3; and 32 U.S.C. § 502 *et. seq.*). January 7, 2007, was the final day of one of the 145th's regularly scheduled instruction drills in Lewiston, Idaho and Ms. Martinez was in attendance. (R, p. 167, ¶ 4). On January 7, 2007, Ms. Martinez' chain of command consisted of her Section Sergeant Tony Rice, First Sergeant Frost and Captain James Deverteuil. (R, p. 173, ¶4).

Each guardsman is on duty from 12:00 a.m. the first date of training until 11:59 p.m. the final day of training. (R, p. 167, ¶ 5). In January of 2007, Ms. Martinez was on duty with the National Guard from 12:00 a.m. on January 6, 2007 until 11:59 p.m. on January 7, 2007. *See id.* In January of 2007, Ms. Martinez lived in Boise, Idaho. Another guardsman, who was also a member of the 145th, lived in the Boise as well. Ms. Martinez was instructed by her superior officer SSG Rice to provide transportation for her fellow guardsman to and from the drill in Lewiston that was completed on January 7, 2007. (R, p. 167, ¶ 6; p. 173, ¶ 5) At the time of the accident, Ms. Martinez was complying with that Order. (R, p. 173, ¶¶ 5-6).

After the accident, Ms. Martinez reported it to SSG Rice and a Line of Duty Investigation was completed by the Army National Guard. Ms. Martinez participated in the investigation and the determination was made that she was on duty at the time of the accident. (R, pp. 167-168, ¶ 7; pp. 170-171; p. 173, ¶ 7, pp. 176-177). As a result, her medical bills were paid by the Army National Guard. (*See id.*; *see also* R, p. 174, ¶ 8).

III. ISSUES PRESENTED ON APPEAL

1. Whether the District Court properly determined, as a matter of law, that Ms. Martinez was acting pursuant to duty with the Idaho National Guard, in accordance with I.C. §6-904(4), at the time of the accident that is the subject of plaintiff's Complaint.
2. Whether the District Court properly determined that Ms. Martinez was acting within the course and scope of her employment at the time of the accident that is the subject of plaintiff's Complaint.
3. Whether the District Court properly determined that, in the alternative, if the "coming and going rule" applies to this case, the "special errand exception" applies to establish that Ms. Martinez was acting within the course and scope of her employment.
4. Whether the District Court properly denied plaintiff's Motion to Strike.
5. Whether plaintiff is entitled to attorney fees on appeal.
6. Whether Ms. Martinez is entitled to attorney fees on appeal.

IV. ARGUMENT

A. Standard of Review.

In an appeal from an Order of Summary Judgment, this Court's standard of review is de novo, applying the same standard used by the District Court in ruling on a Motion for Summary Judgment. *See Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). In addition, when an appeal is from a grant of summary judgment that implicates statutory interpretation, "the interpretation of a statute is a question of law over which this Court exercises free review." *Grazer v. Jones*, 294 P.3d 184, 190 (2013) (internal citations omitted).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

"The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment.... A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment..." *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007) (internal citations omitted).

B. The District Court Properly Determined that Ms. Martinez was Acting Pursuant to Duty With the Idaho National Guard, in Accordance With I.C. §6-904(4), at the Time of the Accident.

Idaho Code § 6-904 states:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: ... 4. Arises out of the activities of the Idaho national guard when engaged in training **or duty** under sections 316, 502, 503, 504, 505 or 709, title 32, United States Code.

Id. (emphasis added). Idaho Code § 6-904 was last amended in 1988. *See id.*

32 U.S.C.A § 502 states in pertinent part that:

> (a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall:
>
> (1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and
>
> (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

There are no Idaho cases interpreting Idaho Code § 6-904(4) in its present form. In *Baca et. al. v. State of Idaho, The Idaho Army Reserve National Guard et. al.*, 119 Idaho 782, 810 P.2d 720 (1990), the Court analyzed the previous version of Idaho Code § 6-904(4), codified in 1987 and designated as Idaho Code § 6-904(5). The Court stated:

> In 1987, Senate Bill 1161, which became Chapter 361, amended Section 6-904(5) of the Tort Claims Act, the same subsection amended in 1974 to eliminate the Guard's immunity when acting under a call of the Governor. SB 1161 closed a loophole in Section 6-904(5) by ensuring that the State of Idaho would not be liable for **actions of the Guard in instances where the federal government had assumed full responsibility.**

Id. at 793, 810 P.2d at 731 (emphasis added).

In *Baca*, two Idaho Army National Guard members were driving fire fighters back to camp when they were involved in an automotive accident most likely caused by fatigue. *Id.* at 784, 810 P.2d at 722. The court found the exemption in Idaho Code § 6-904(4) did not apply because the Guard members were not engaged in training or duty pursuant to any of the federal regulations identified in Idaho Code § 6-904(4) but rather had been called to action by the Governor of the State of Idaho who declared a state of emergency because of the Anderson creek fire. *See id.* at 793-794, 810 P.2d at 731-732. Under those circumstances, the state of Idaho is responsible for the actions of the Guard members acting within the course and scope of their duty under state authority. *See id.*

On January 7, 2007, when the accident in this case occurred, Ms. Martinez was a member of the Idaho National Guard, on duty pursuant to 32 U.S.C.A. §502 and complying with a direct order from her superior officer to transport a fellow guardsman to Boise, Idaho. (R, pp. 167-168, ¶ 7; pp. 170-171, 173-174, 176-177). Ms. Martinez's superior officer, SSG Tony Rice, explained in his affidavit that National Guard members

are on duty until 11:59 p.m. on the last day of the mandatory drill. (R, p. 167, ¶ 5). This accident occurred at 12:43 p.m. (R, p. 170).

Ms. Martinez was being paid by the National Guard when this accident occurred. (R, p. 167, ¶ 5; p. 253). In addition, at the time of the accident, Ms. Martinez was carrying out a specific order from her superior officer to transport a fellow guardsman to Boise. (R, p. 167, ¶ 6; p. 173, ¶ 6). The exemption under Idaho Code § 6-904(4) is not limited to training activities performed pursuant to 32 U.S.C.A § 502 but "training ***or*** duty." I.C. § 6-904(4). The fact that Ms. Martinez was acting pursuant to duty at the time of the accident was confirmed by the investigation completed by the National Guard Bureau. (R, pp. 170-171, 174, 176-177). Because Ms. Martinez was injured while on duty, the medical bills she incurred as a result of the accident were paid by the Army National Guard. *See id.* If Ms. Martinez had not been acting in accordance to duty at the time of the accident, her medical bills would not have been paid by the National Guard.

In addition, at the time of the accident, Ms. Martinez and the passenger she was transporting were in full uniform with their rank and military affiliation clearly displayed. (R, p. 374). Ms. Martinez rode in the ambulance with plaintiff and he would have observed her in her military uniform. *See id.*

Ms. Martinez was acting within the course and scope of her employment with the Idaho National Guard and in accordance with her duty with the National Guard

on January 7, 2007, when this accident occurred. As stated previously, the rationale behind Idaho Code § 6-904(4) is to exempt Idaho National Guard members from liability when they are acting pursuant to duty or participating in trainings and drills mandated by the federal government because the federal government assumes liability during that time period. *See Baca*, 119 Idaho at 793, 810 P.2d at 731.

The appropriate forum for the resolution of claims arising under those circumstances is federal court with federal claims. The only claim plaintiff alleged in his Complaint in this matter was a state law claim for negligence for which, pursuant to Idaho Code § 6-904(4), Ms. Martinez cannot be held liable. As such, plaintiff's Complaint against Ms. Martinez was properly dismissed by the District Court.

C. The District Court Properly Determined that Ms. Martinez was Acting Within the Course and Scope of Her Employment With the Idaho National Guard at the Time of the Accident.

Because Ms. Martinez was acting in accordance to duty with the Idaho National Guard at the time of the accident, the next question in the analysis is whether she was also acting within the course and scope of her employment. *See* Idaho Code § 6-904. In *Anderson v. Spalding*, 137 Idaho 509, 50 P.3d 1004 (2002), the Court held that, "[a]cts that are within the scope of employment are 'those acts which are so closely connected with what the servant is supposed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment.'" *Id.* (*quoting The Richard J. and Esther E.*

Wooley Trust v. DeBest Plumbing, Inc., 133 Idaho 180, 184, 983 P.2d 834, 838 (1999)). The Court further explained, based on *Wooley*, "...that an employee's conduct is within the scope of employment if 'it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, *at least in part,* by a purpose to serve the master.'" *Id.* (citations omitted) (emphasis in original). "As a general statement of these rules, Idaho courts have stated that the test for whether an employee was acting within the scope of employment when he committed a tort is the right to control reserved by the employer over the functions and duties of the agent." *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 945, 854 P.2d 280, 288 (1993) (internal citations omitted).

The same undisputed facts that establish that Ms. Martinez was acting in accordance to duty at the time of the accident are the facts that establish that she was acting within the course and scope of her employment. Ms. Martinez was in uniform and considered on duty until 11:59 p.m. that evening. (R, p. 167, ¶ 5; p. 374, ¶¶ 3-4).

Ms. Martinez was being paid by the National Guard when this accident occurred. (*See id*; *see also* R, p. 253). In *Barker v. Fischbach & Moore, Inc.,* 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986), the Court stated that compensation of an employee while they are traveling will justify a finding that the employee is an employee acting within the course and scope of their employment. *See id.*

In addition, at the time of the accident, Ms. Martinez was carrying out a

specific order from her superior officer to transport a fellow guardsman to Boise. (R, p. 167, ¶ 6; p. 173, ¶ 6). Complying with the instructions of her immediate supervisor shows that Ms. Martinez was engaged in conduct that was *at least in part,* for the purpose of serving the master. *See Wooley,* 133 Idaho at 184, 983 P.2d at 838. It also establishes that Ms. Martinez' immediate supervisor had the requisite amount of control necessary over her functions and duties because he directed her to transport her fellow guardsman to Boise and she was doing it. *See Podolan*, 123 Idaho at 945, 854 P.2d at 288.

Plaintiff argues that because the other guardsman assisted in paying the gas expense incurred while traveling to Boise that it somehow negates the fact that that Ms. Martinez was complying with her superior officer's instruction. (*See* Appellant's Brief, p. 17). In *Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992), the Court stated that "[a]n act done partly for personal reasons and partly to serve an employer is still within the scope of employment." *Id.* at 845, 840 P.2d at 389 (internal citations omitted).

While sharing the expense was beneficial to Ms. Martinez, it doesn't change the fact that she was acting at the direction and control of her superior officer and acting within the course and scope of her employment with the Idaho National Guard when the accident occurred on January 7, 2007.

D. Whether the District Court Properly Determined that, in the Alternative, if the "Coming and Going Rule" Applies to this Case, the "Special Errand Exception" Applies to Establish that Ms. Martinez was Acting Within the Course and Scope of Her Employment.

1. Exceptions to the coming and going rule establish that Ms. Martinez was acting within the course and scope of her employment.

Plaintiff argues that Ms. Martinez was not acting within the course and scope of her employment based upon the application of a rule used in workers' compensation cases which "provides that an employee is ordinarily not in the course of employment when going to or coming from work." *Casey v. Sevy*, 129 Idaho 13, 17, 921 P.2d 190, 194 (Ct. App. 1996). The rule is commonly referred to as the "coming and going rule," to which there are numerous exceptions.

One such exception is that of the traveling employee. Pursuant to *Andrews v. Les Boise Masonry, Inc.*, 127 Idaho 65, 67, 896 P.2d 973, 975 (1995), the Supreme Court of Idaho stated the traveling employee doctrine in Idaho is as follows:

> When an employee's work requires the employee to travel away from the employer's place of business ***or the employee's normal place of work***, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs.

Id. (emphasis added). In *Ridgeway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977), the Court applied the traveling employee exception to a two week business trip the employee was required to take and stated that injuries incurred on the trip including "... 'injuries arising out of the necessity of sleeping in hotels or eating in

restaurants away from home are usually held compensable.'" *Id.* at 411-412, 565 P.2d at 1368-69 (internal citations omitted).

It is undisputed that in January of 2007, Ms. Martinez lived and worked in Boise, Idaho. (R, pp. 246-248, 252). As part of her employment with the Idaho National Guard, Ms. Martinez was required to drive from Boise, Idaho to Lewiston, Idaho once a month to attend federally mandated training drills. (R, p. 173). Although the Guard did not pay for Ms. Martinez's traveling expenses, that factor alone is not dispositive of whether an employee will be considered a traveling employee. *See Andrews*, 127 Idaho at 67, 896 P.2d at 975.

The more significant factor is that Ms. Martinez participated in the two day trainings and was paid by the National Guard for her on-duty time which ended at 11:59 p.m. on the evening of January 7, 2007. (R, p. 253; p. 167, ¶ 5). In *Barker v. Fischbach & Moore, Inc.,* 110 Idaho 871, 872, 719 P.2d 1131, 1132 (1986), the Court held that compensation of an employee while they are traveling will justify a finding that the employee is a traveling employee acting within the course and scope of their employment. *See id.* Based on the facts in this case, Ms. Martinez was a traveling employee to whom the coming and going rule does not apply.

In *Finholdt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007), the Court renewed its approval of a second exception to the coming and going rule for "an employee who, 'although not at his regular place of employment, even before or after

customary working hours, is doing, is on his way home from performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of his employer.'" *Id.* at 898, 155 P.3d at 699 (internal citations omitted).

It is undisputed that at the time of the accident, Ms. Martinez was carrying out a specific order from her superior officer to transport a fellow guardsman to Boise. (R, p. 167, ¶ 6; p. 173, ¶ 6). As the District Court held, Ms. Martinez was acting at the direction and control of her superior officer and carrying out a special errand / order on behalf of the National Guard while traveling on January 7, 2007. (*See id.*; *see also* R, p. 334-335). Because the special errand exception to the coming and going rule applies to the facts of this case, at the time of the accident, Ms. Martinez was acting within the course and scope of her employment with the Idaho National Guard.

A third applicable exception to the coming and going rule in this case is when the employer agrees, either expressly or impliedly, that the employment relationship shall continue during the period of coming and going. *See Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194 (Colo. Ct. App., 1983). In *Hagans*, Thomas Hagans was a volunteer member of the Colorado Civil Air Patrol ("C.A.P.") who crashed in a plane during a 75 mile trip from his home while he was on his way to attend a regularly scheduled C.A.P. training. *See id.* at 195. The following facts were noted by the court:

> On March 11, 1980, Hagans and his brother, who was also a C.A.P. member, left Hagans' ranch in the brother's plane to

> attend a regularly scheduled C.A.P. meeting. The ranch was about 75 miles away from the Lamar Municipal Airport. The mode of transportation to the meetings was the individual member's choice, and the commander of the Lamar squadron of the C.A.P. had approved of *[sic]* the Hagans flying to meetings. The cost of transportation was borne by the individual members. Enroute to the meeting, Hagans and his brother received word that they could not land at Lamar because of weather conditions. After turning around to return to the ranch, the plane crashed and Hagans was injured.
>
> The referee found that Hagans was considered to be under C.A.P. jurisdiction from the time of leaving home until his return following the meeting, and that the only purpose for undertaking the travel was to attend the meeting.

Id.

The court agreed that "traveling to attend [the training] was included in the activity by necessity; that Hagans' duty encompassed all of his activity from leaving for the meeting until his return; that he was traveling at the behest of his employer; that, therefore, his injury during travel arose out of and in the course of his employment; and that Hagans' activities generated some benefit to the C.A.P. and, thus, had a dual purpose." *Id.* The court acknowledged the coming and going rule but found an exception applied.

> Among such special circumstances is the exception that an employer may agree, expressly or impliedly, that the employment relation shall continue during the period of coming and going. . . . Such an agreement may be inferred here. The C.A.P. commander testified that, under patrol regulations, its members are pursuing C.A.P. duties from the time they leave home to attend a meeting until they return. This testimony supports the finding of the Commission that

> "traveling to attend was included in the activity by necessity; the duty of claimant encompassed all of his activity from the moment of entering the aircraft to depart for the meeting, through the time of travel."
>
> Thus, when a claimant, at the time of his injury, is performing a duty with which he is charged as a part of his contract for service, or under the express or implied direction of his employer, he is within the course of his employment under the Workmen's Compensation Act.

Id. at 196 (internal citations omitted).

The C.A.P. analysis is the most comparable to the employment situation that exists between Ms. Martinez and the Idaho National Guard. As with the C.A.P., Idaho National Guard has agreed, either expressly or impliedly, that the employment relation continues during the period of coming and going. *See id.* The existence of this agreement is based on the following facts: Ms. Martinez was considered on duty with the Idaho National Guard until 11:59 p.m. on January 7, 2007; she was being paid at the time of the accident by the National Guard; she was expected to comply with orders from her superior officer to transport a fellow guardsman to Boise, Idaho; and because Ms. Martinez was injured while acting pursuant to duty, the medical bills she incurred as a result of the accident were paid by the Army National Guard. (R, pp. 167-168, 170-171, 173-174). Ms. Martinez' travel to Boise while transporting her fellow guardsman, was within the course and scope of her employment with the Idaho National Guard.

Plaintiff cites *State v. Superior Court of the State of Arizona et. al.*, 524 P.2d 951 (1974), for the proposition that the coming and going rule should apply to

national guardsmen driving to training drills. (*See* Appellant's Brief, pp.18-19). In *Arizona*, the guardsman was in an accident while traveling to the training but before the time he was scheduled to report for duty. *See id.* at 953. This factor was significant to the court and there was no evidence that the guardsman was considered "on duty" at the time of the accident. The court stated that this "...travel was not within the scope of the employment **unless the employee is rendering a service growing out of or incidental to the employment.**" *Id.* at 954 (emphasis added).

It is undisputed that, unlike the facts in *Arizona*, at the time of the accident in this case, Ms. Martinez was rendering a service incidental to her employment by transporting her fellow guardsman at the instruction of her superior officer. (R, pp. 167, 173). Ms. Martinez was being paid and was considered to be "on-duty." *See id.*

In addition, state law applies to determine when an employee is acting within the course and scope of their employment. There is no discussion of any of the exceptions to the coming and going rule in the *Arizona* court's opinion so it is unclear whether, in 1974, Arizona even recognized the same exceptions to the coming and going rule that Idaho does today. Therefore, this case is distinguishable and is not controlling on the Court in reaching its determination in this case.

2. Application of the coming and going rule exceptions to ITCA.

Although plaintiff argues that this Court should apply the coming and going rule and find that Ms. Martinez was not acting within the course and scope of her

employment, he claims that the well-known exceptions to the coming and going rule would have to be specifically identified by the legislature in Idaho §6-904 before they could be applied to determine Ms. Martinez was acting within the course and scope of her employment. (*See* Appellant's Brief, p. 25). However, plaintiff cites no legal authority that would require this Court to apply a general principle and not its well-recognized exceptions.

In addition, all three exceptions, as well as the coming and going rule to which the exceptions relate, are only relevant if the Court determines that workers' compensation principles should be applied to tort cases within the purview of the Idaho Tort Claims Act.

In *Casey v. Sevy*, 129 Idaho 13, 17, 921 P.2d 190, 194 (1996), the Idaho Court of Appeals stated that:

> In worker's compensation cases, Idaho courts have applied the "coming and going rule," which provides that an employee is ordinarily not in the course of employment when going to or coming from work.... While Idaho appellate courts have not yet applied this rule in cases involving third-party negligence actions, neighboring jurisdictions have. *See e.g., Faul v. Jelco, Inc.,* 122 Ariz. 490, 595 P.2d 1035, 1037 (Ct.App.1979); *Connell v. Carl's Air Conditioning,* 97 Nev. 436, 634 P.2d 673, 674 (1981); *Skinner v. Braum's Ice Cream Store,* 890 P.2d 922, 924 (Okl.1995); *Runyan v. Pickerd,* 86 Or.App. 542, 740 P.2d 209, 210 (1987); *Whitehead v. Variable Annuity Life Ins.,* 801 P.2d 934, 936 (Utah 1989); *Dickinson v. Edwards,* 105 Wash.2d 457, 716 P.2d 814, 819 (1986). **We see no reason not to apply the coming and going rule set forth in our worker's compensation cases to cases involving third-party negligence actions brought**

against employers based on a theory of *respondeat superior.*

The Court also discussed several exceptions to the coming and going rule. *See id.* at 18, 921 P.2d at 194.

Plaintiff is correct that the coming and going rule or its exceptions have never been applied by an Idaho court in the context of analyzing course and scope of employment under the Idaho Tort Claims Act. The Idaho Tort Claims Act does not contain a definition of "course and scope of employment" nor does it state anywhere in the act that workers' compensation principles should or should not be instructive when determining the issue. *See* § I.C. 6-901 *et. seq.* However, based on *Casey*, cited *supra*, there's "...no reason not to apply the coming and going rule..." and its exceptions, to the analysis of course and scope of employment under the Idaho Tort Claims Act. *See Casey*, 129 Idaho at 17, 921 P.2d at 194.

The fact that we don't have definitive law on this point in Idaho is likely why the District Court found "in the alternative" that if the coming and going rule applied in this case, an exception to the rule also applied. (R, p. 338). The Court was responding to the argument raised by plaintiff that the coming and going rule should apply and the Court should find that Ms. Martinez was not acting in the course and scope of her employment. *See id.* If the coming and going rule applies, as originally argued by plaintiff, then the exceptions to the coming and going rule must also be addressed.

The District Court only addressed one exception in its opinion but any one

of the three exceptions raised by Ms. Martinez would be sufficient to defeat plaintiff's argument and support the determination that, even under workers' compensation principles, Ms. Martinez was acting within the course and scope of her employment with the National Guard at the time of this accident.

E. Whether the District Court Properly Denied Plaintiff's Motion to Strike.

1. SSG Tony Rice's and Mallory Martinez' Affidavits do not contain inadmissible legal conclusions.

In support of her Motion for Summary Judgment, Ms. Martinez filed her own affidavit and an affidavit from SSG. Tony Rice. Plaintiff filed a Motion to Strike certain paragraphs and exhibits of those Affidavits. Paragraph 5 of SSG Tony Rice's Affidavit states: "January 7, 2007, was the final day of one of the 145th's regularly scheduled instruction drills in Lewiston, Idaho and SPC Mallory Larson was in attendance. SPC Larson was on duty from 12:00 a.m. from January 6, 2007 to 11:59 p.m. on January 7, 2007." (R, p. 167). Paragraph 6 of Ms. Martinez' Affidavit states that "[a]t the time of the accident on January 7, 2007, I was on duty with the Idaho National Guard and was acting under my superior's orders by transporting a fellow guardsman to Boise, Idaho." (R, p. 173). Ms. Martinez' superior officer is SSG Rice.

Paragraph 7 of SSG Rice's Affidavit states:

> SPC Larson notified me of the accident after it occurred. A Line of Duty Report of Investigation was completed. The result of the investigation determined that SPC Larson was on duty at the time of the accident and her medical bills were paid as a result of that determination. A fair and accurate

> copy of the Report of Investigation which is maintained as a regular course in the personnel file of SPC Larson of which I am personally familiar, is Attached as Exhibit A....

(R, p. 167). Paragraph 7 of Ms. Martinez's Affidavit states:

> After the accident, I reported it to SSG Rice and an investigation was completed to determine if I was on duty. I cooperated in that investigation and received a copy of the report once it was completed. A fair and accurate copy of the report I received is attached as Exhibit A...

(R, p. 173).

As the superior officer of Ms. Martinez, SSG Rice would know when he and Ms. Martinez were considered to be "on duty" for the purpose of the Idaho National Guard's policies and procedures. This is a fact of which SSG Rice has personal knowledge and to which he can testify. Similarly, Ms. Martinez knew she was getting paid by the National Guard until 11:59 p.m. on January 7, 2007, and she notified her supervising officer immediately after the accident. All of which is consistent with her understanding that she was "on duty," a fact that, as a member of the National Guard, she would have personal knowledge of.

As explained below, because the document attached to the Affidavits as Exhibit A is admissible pursuant to the Records of Regularly Conducted Activity and the Public Records and Reports exceptions to the hearsay rule, the information contained in that report is likewise not an inadmissible legal conclusion.

2. **Exhibit A to SSG Rice's and Ms. Martinez' Affidavits are admissible pursuant to the records of regularly conducted activity and public records and reports exceptions to the hearsay rule.**

Idaho Rule of Evidence 803(6) and (8) state the following documents are admissible even though they contain hearsay:

> **(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
> ...
>
> **(8) Public Records and Reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D)

> factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

As explained by SSG Rice, Exhibit A attached to his Affidavit is a Line of Duty Report that was completed after the accident in this case. (R, pp. 167-168). This report is kept during the regular course of the Idaho National Guard in Ms. Martinez' personnel file with which SSG Rice, as her superior officer, is personally familiar. As such, SSG Rice is a qualifying witness pursuant to Idaho Rule of Evidence 902(11) and has met all criteria to establish the admissibility of Exhibit A as a record of regularly conducted business pursuant to Idaho Rule of Evidence 803(6).

In addition, the National Guard is a public office or agency which issued this Line of Duty Report as factual findings resulting from an investigation made pursuant to authority granted by law. Therefore, the Line of Duty Report is also admissible pursuant to Idaho Rule of Evidence 803(8).

3. The District Court properly denied plaintiff's Motion to Strike.

The District Court held that the statements by Ms. Martinez and SSG Rice are admissible because the "affiants are testifying as to facts they have personal knowledge about." (R, p. 329). The District Court further held that the documents attached to the affidavits fell under the I.R.E 803(8) exception to the hearsay rule. *Id.* Finally, the District Court determined that it would have reached the same conclusion in granting Ms. Martinez' Motion for Summary Judgment even if the exhibits had been

stricken. *Id.*

The District Court properly denied plaintiff's Motion to Strike because the evidence contained in the affidavits of Ms. Martinez and SSG Rice is admissible. Even if it were not however, the denial of the Motion was harmless error because the District Court concluded there was sufficient evidence, without the exhibits, to grant Ms. Martinez' Motion for Summary Judgment.

F. Plaintiff is Not Entitled to Attorney Fees on Appeal.

Plaintiff claims that if he is the prevailing party on appeal, he is entitled to an award of attorney fees under I.C. § 12-121 and Rule 54. (*See* Appellant's Brief, p. 29). Although plaintiff correctly states that "[a]n award of attorney fees is appropriate on appeal under I.C. § 12-121when the appeal has been brought or defended frivolously, unreasonably, or without foundation...," he does not state how Ms. Martinez has defended this appeal frivolously. (*See* Appellant's Brief, p. 29). In *Chavez v. Canyon County, et. al.*, 152 Idaho 297, 305, 271 P.3d 695, 703 (2012), the Court held that "Chavez did not provide authority for this issue, nor did he argue how this appeal was defended frivolously, unreasonably, or without foundation by the County. Without such, it will not be considered on appeal."

Plaintiff's request for attorney fees on appeal should be denied.

G. Ms. Martinez is Entitled to Attorney Fees on Appeal.

Should the Court rule in Ms. Martinez' favor, she requests this Court award

attorney fees and costs on appeal pursuant to I.C. §12-121 and I.R.C.P. 54. As stated above, an award of attorney fees is appropriate on appeal when the appeal has been brought or defended frivolously, unreasonably, or without foundation. *See id.* In *Bowles v. Pro Indiviso, Inc.,* 132 Idaho 371, 377, 973 P.2d 142, 148 (1999), the Court expounded further on what it means to bring an appeal without foundation. "An award of attorney fees is appropriate 'if the law is well-settled and the appellants have made 'no substantial showing that the district court misapplied the law.' " *Id.* (internal citations omitted). In *Rueth v. State*, 103 Idaho 74, 81, 644 P.2d 1333, 1340 (1982), the Court awarded fees to the respondent when "a dispassionate view of the record disclos[ed] there was no valid reason to anticipate reversal of the judgment below on the factual grounds urged. The record contain[ed] abundant evidence supporting the determination of the judge and jury."

In this case, plaintiff has not presented any valid reasons to anticipate reversal of the District Court's decision. There are no materials issues of fact and the District Court's application of the undisputed facts to the law was well reasoned. Ms. Martinez therefore requests that she be awarded her costs and attorney fees on appeal.

V. CONCLUSION

Ms. Martinez produced uncontroverted evidence that, at the time of the accident, she was on duty acting within the course and scope of her employment and acting in accordance to duty by complying with instructions given to her by her superior officer to transport her fellow guardsman to Boise. (R, p. 167, ¶ ¶ 5-6).

In accordance with Idaho Code § 6-904(4), Idaho National Guard members cannot be held liable for state law claims arising out of their activities when they are in training or acting under duty pursuant to certain federal statutes, including 32 U.S.C.A. §502.

The District Court properly determined that the exemption under Idaho Code § 6-904(4) applied and granted Ms. Martinez's Motion for Summary Judgment. Ms. Martinez respectfully requests that this Court uphold the District's Court's Summary Judgment Order dismissing plaintiff's claims in this matter.

DATED this 25th day of March 2013.

CLEMENTS, BROWN & McNICHOLS, P.A.

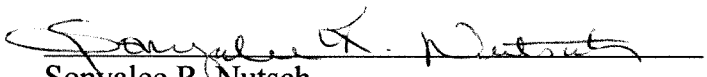
By _____
SONYALEE R. NUTSCH
Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March 2013, pursuant to I.A.R. 34(d), I caused to be served two (2) true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Ned A. Cannon
Smith & Cannon PLLC
508 8th Street
Lewiston, ID 83501

___ U.S. MAIL
_X_ HAND DELIVERED
___ OVERNIGHT MAIL
___ TELECOPY (FAX)



Sonyalee R. Nutsch

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted via e-mail is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following e-mail address:

Ned A. Cannon
Smith & Cannon PLLC
508 8th Street
Lewiston, ID 83501
Ned@smithcannonlaw.com

DATED and CERTIFIED this 25th day of March 2013.

CLEMENTS, BROWN & McNICHOLS, P.A.

By _____
SONYALEE R. NUTSCH
Attorneys for Defendant-Respondent